SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

Supreme Court, U.S.
FILED
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No. 1008

DENNIS HAMILTON,

Petitioner,

-against-

UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan, and RANDOLPH W. THROWER, Commissioner of Internal Revenue of the United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, et al.,

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TO: THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to review a judgment of that Court entered August 28, 1970 affirming two orders of the United States District Court, for the Southern District of New York, one entered November 14, 1969, denying petitioner's motion for preliminary injunction, and the second entered January 19, 1970, granting respondents' motion to

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dismiss the complaint.

The judgment of the Court of Appeals appears at A-2*. The opinion of the Court of Appeals is reported at 429 F.2d 427 and appears at A-4. The first order and opinion of the United States District Court for the Southern District of New York (Mansfield, U.S.D.J.) is reported at 309 F.Supp. 468 and 69-2 CCH, U.S. Tax Cases, ¶15,924 and also appears at A-5. The second order and opinion of that Court (Mansfield, U.S.D.J.) appears at A-22.

JURISDICTION OF THE COURT

The judgment sought to be reviewed herein is that of the United States Court of Appeals for the Second Circuit, entered August 28, 1970. No orders respecting a rehearing or granting an extension of time within which to petition for certiorari have been sought or entered.

Jurisdiction of this Court of this petition is based upon 28 U.S.C. §1254(1). Hiatt v. Brown, 339 U.S. 103(1950) sustains this jurisdiction. Cf.: Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1 (1962).

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* "A- " references are to pages in the Appendix herewith.

ISSUES PRESENTED

Fundamentally, the issue herein is whether or not this case falls within the exception (found in Enochs v. Williams Packing Co., 370 U.S. 1 (1962)) to the limitation upon a federal court's jurisdiction (established in 26 U.S.C. § 7421 (a)) to restrain the assessment and collection of the wagering excise tax (26 U.S.C. § 4401 (a)) where three days wagering receipts were used to calculate the wagering receipts allegedly collected by petitioner during the preceding four years, on the grounds that petitioner failed to keep records of his actual gross receipts for that period, and where there was no evidence that petitioner had in fact engaged in the wagering business for that period, or if he had, what the volume of his business was, and where petitioner alleged that the three days receipts were unlawfully seized and where equity jurisdiction otherwise exists.

This issue breaks itself down into the following questions petitioner seeks to have this Court review:

1. Since petitioner cannot be required, under the doctrine of Grosso v. United States, 390 U.S. 62 (1968), and related cases* to

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* See Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969)

directly pay the wagering excise tax (26 U.S.C. § 4401 (a)) may the government force him to pay that tax indirectly by levying upon his property in an amount the government claims is due for such tax?

2. Since petitioner cannot be required, under the doctrine of Grosso, supra, and related cases*, to produce books and records related to alleged wagering activities, does the Government's calculation of gross wagering receipts for a four year period, based upon gross receipts for the last three days of that period, penalize petitioner's exercise of his Fifth Amendment right to decline to reveal records which might show the true gross amounts for that period, either to correct that assessment or to bring a refund action.

STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

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* See note at p.3.

nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 4401:

(a) WAGERS. - There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof. Source: Sec. 3285(a), 1939 Code, substantially unchanged.

(b) AMOUNT OF WAGER. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded. Source: Sec. 3285(c), 1939 Code, substantially unchanged.

(c) PERSONS LIABLE FOR TAX. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having

> registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

26 U.S.C. § 7421(a):

> Except as provided in sections 6212(a) and (c), and 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

STATEMENT OF THE CASE

1. Jurisdiction and Prior Proceedings Herein.

The summons and complaint herein were filed on June 24, 1969, the action being based upon the federal question jurisdiction of the District Court, over $10,000 being in controversy (28 U.S.C. 1331(a)). On June 27, petitioner moved for preliminary injunction and a stipulation was then entered into whereby the Government agreed voluntarily to refrain from taking further collection action against petitioner until July 22, 1969.

The Government later filed papers in opposition to the motion and on November 14, 1969 Judge Mansfield denied this preliminary relief. (A-5) Notice of appeal therefrom

was filed February 11, 1970.

The Court of Appeals for the Second Circuit considered both appeals and affirmed the District Court's orders, on August 28, 1970. (A-2) This petition seeks review of that judgment of the Court of Appeals.

2. Facts.

This was an action brought by petitioner against the United States, the Commissioner of Internal Revenue and the District director of Internal Revenue for Manhattan. Injunctive and declaratory relief was sought adjudging the action of respondents in assessing the excise tax delinquency charged against petitioner to be unlawful and to enjoin the levying of any property of petitioner in satisfaction thereof.

The verified complaint alleged that on or about May 21, 1965 petitioner was arrested on a charge of violation of the wagering tax laws and that on that same date "federal agents, in contravention of the Fourth Amendment to the Constitution of the United States, illegally seized certain records covering the three-day period from May 19 [1965] through May 21, 1965, purporting to show that [petitioner] accepted average daily wagers amounting to $2,444.03 during said three-day period."

Thereafter, it is further alleged, that on or about April 5, 1968, these criminal charges were dropped, on motion of the United States Attorney, based upon recent decisions of this Court.* However, in April, 1969 respondents

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* Marchetti v. United States, supra and Grosso v. United States, supra.

filed federal tax liens against petitioner claiming a deficiency plus interest and charges, of over $385,000.00 for excise (wagering) taxes for the period July 1, 1961 to May 21, 1965. This assessment was claimed by petitioner to be "arbitrary, capricious, unreasonable, illegal and totally excessive"

The Government sought to justify this assessment of four years based upon three days of receipts and without evidence that petitioner had been in the wagering business for that period and, even if he had been, without evidence of the volume of business he had done, on the grounds, as noted by the Assistant United States Attorney in his affidavit in opposition to petitioner's motion for summary judgment, that

> Mr. Hamilton did not keep any records of wagers during the period from 1961 through 1965, during which he admittedly [*] was engaged in the business of accepting "policy" wagers.

This argument was further pressed in the Government's briefs below.

In addition, petitioner alleged in his complaint "that, defendants, well knowing that plaintiff had consistently been required in the preservation of his legal interests to invoke his constitutional privilege against self-incrimination,

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* No evidence was ever brought forward to substantiate this claim that Hamilton had made such admission.

would by means of an arbitrary and capricious assessment and seizure, relegate plaintiff to a suit for refund of the funds subsequent to said fraudulent assessment and seizure... [W]hen plaintiff was confronted with the burden of proof in a refund suit by means of an arbitrary and capricious assessment and seizure of said funds as aforesaid, the burden of proof would be hopelessly inconsistent with the exercise of plaintiff's right against self-incrimination."

In his motion for preliminary injunction, petitioner relied primarily upon his verified complaint, an attorney's affidavit and an affidavit by him in which he pointed out that collection of the astronomical assessment of over $385,000 would clearly ruin him if it were enforced. Moreover, it was impossible for petitioner to sue the Government for return of this assessment, if he could pay it, because that would require a waiver of his Fifth Amendment right to silence which he was in no position to do.

In response to petitioner's motion for preliminary injunction, the Assistant United States Attorney stated in his affidavit that that petitioner

> has admitted to being in the business of accepting wagers on "policy" slips for a period beginning at least July 1961 to May 21, 1965.

He also noted that petitioner

> had been arrested for dealing in "policy" slips on four occasions prior to May 21, 1965: July 22, 1957, September 16, 1959, November 10, 1959 and November 6, 1961. He was convicted on each occasion.

However, no such "admission" by petitioner appears in this record - indeed, no such "admission" was ever made. Moreover, no evidence was ever produced by the Government to show that petitioner had been engaged in collecting wagers between July 1961 and May 1965, nor the extent of any such alleged wagering business.

Judge Mansfield denied plaintiff's motion for preliminary injunction and on the basis of his decision there subsequently granted the Government's motion to dismiss the complaint under Rule 12(b)(1), F.R.Civ.P., for lack of subject matter jurisdiction. The Court concluded, on that motion, that plaintiff had failed to meet the test outlined in Enochs, supra, required to bestow subject matter jurisdiction on the Court.

THE ISSUES HEREIN ARE SUBSTANTIAL AND INVOLVE FUNDAMENTAL QUESTIONS CONCERNING THE APPLICABILITY OF THE FIFTH AMENDMENT AND THE PARAMETERS SURROUNDING THE MARCHETTI AND GROSSO LINE OF CASES.

SUMMARY

This case arises in the context of the Enochs v. Williams Packing Co., supra, exception to the statute prohibiting a federal court from "restraining the assessment

or collection of any tax," 26 U.S.C. §7421 (a).* In Enochs this Court declared that an injunction action could be maintained "restraining the assessment or collection of any tax"

> if it is clear that under no circumstances could the Government ultimately prevail...[and] if equity jurisdiction otherwise exists.
>
> (370 U.S., at 7)

The issues raised herein go to the question of whether or not, under no circumstances

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* Actually the principle that the section does not absolutely bar injunction actions existed prior to Enochs. See, e.g., Miller v. Standard Nut Margerine Co., 284 U.S. 498 (1932), Allen v. Regents of University System, 304 U.S. 439, 449 (1938) ("statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law."); Bailey v. George, 259 U.S. 16 (1922); Hill v. Wallace, 259 U.S. 44 (1922).

could the Government ultimately prevail."* And petitioner's position in that regard is twofold: First, the Government cannot prevail in enforcing the wagering tax provision against him because to do so circumvents the rule laid down by this Court in Grosso v. United States, supra, and related cases.** To allow the Government to forcibly take petitioner's property in payment of an alleged tax which petitioner cannot lawfully be compelled to pay by criminal sanctions, is to circumvent the spirit and thrust of the Grosso line of cases.

Second, the Government cannot be allowed to forcibly take petitioner's property in settlement of a tax liability which is figured on an arbitrary basis and, in

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* As to the question of equity jurisdiction existing herein, petitioner pointed out in his verified complaint that the collection of the $385,000 assessment here would ruin him financially: "Plaintiff does not have the resources, financial or otherwise, to pay the aforesaid assessment of $385,471.71 and cannot pay said assessment." And further, "Unless this Court grants plaintiff an injunction, plaintiff will suffer immediate and irreparable damage by the seizure of property held in his name...all resulting in his economic ruin."

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Beacon Theatres v. Westover, 359 U.S.500, 506-507 (1959) and see cases cited at 507, note 8. The question of inadequacy of legal remedies is touched upon below in connection with petitioner's Fifth Amendment claim.

** See footnote at 3, above.

effect, in punishment of petitioner for his failure to keep records which the Marchetti-Grosso cases dictate he cannot be compelled to keep or to disclose to the Government. This assessment not only punishes petitioner outright for his failure to keep those records, but additionally forces him into the untenable position of having to pay the unlawful assessment and then to sue for refund under such circumstances as to require him to waive his Fifth Amendment right to silence by disclosing records he is not otherwise required to disclose.

These issues raise substantial questions which deserve the critical attention of this Court.

It must also be noted that the question herein concerning the enforcement of the wagering tax itself is closely connected to the question of the lawfulness of proceedings designed to accomplish the forfeiture of paraphernalia used in the wagering business. This issue is now before the Court in the matter of U.S. v. U.S. Coin & Currency*, and it is not inappropriate that the instant case be considered therewith, presenting, as it does,

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* 379 F.2d 946 (7th Cir.1967) affirming judgment in District Court forfeiture proceeding in favor of U.S.; vacated and remanded for further consideration in light of Marchetti and Grosso, 390 U.S.204 (1968); on remand, 393 F.2d 499, holding forfeiture proceedings cannot be maintained; certiorari granted 393 U.S.949; case restored to calendar (No. 477) 395 U.S.918 (1969).

a separate aspect of the same problem as to the outer limits of the Marchetti - Grosso cases.

THE ARGUMENT THAT THE GOVERNMENT MAY NOT DO INDIRECTLY, BY FORCIBLE SEIZURE OF PETITIONER'S PROPERTY, BASED UPON AN ARBITRARY TAX ASSESSMENT WHAT THE MARCHETTI - GROSSO LINE OF CASES SAY IT MAY NOT DO DIRECTLY THROUGH THE USE OF CRIMINAL SANCTIONS.

I

In the Marchetti and Grosso cases this Court held that defendants there could not be prosecuted for failure to register and to pay an occupational tax for engaging in the business of accepting wagers (Marchetti) and in addition, for failure to pay the excise tax on wagering and to file the required tax return therefor (Grosso). The rationale behind these cases is that the defendant is

> entirely within "an area permeated with criminal statutes," where he is "inherently suspect of criminal activities." Albertson v. SACB, 382 U.S.70, 79...
>
> (Grosso, 390 U.S., at 64)*

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* In Albertson the Court had noted (382 U.S., at 79):

> here [the questions] are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the forms questions in context might involve the petitioners in the admission of a crucial element of a crime.

and that

> petitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him; his claim of privilege as to the entire tax payment procedure was therefore neither "extreme" nor "extravagant."

Thus the Marchetti - Grosso cases held that as against a claim of privilege under the Fifth Amendment the wagering excise tax provisions could not be enforced,* though clearly many courts have read those opinions as more broadly striking down the tax altogether.**

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* As noted in the Statement of the Case hereinabove, the Government dismissed criminal charges pending against this petitioner at the time Marchetti, Grosso and Haynes were decided.

** See, e.g., U.S. v. Manfredonia, 391 F.2d 229, 230 (2d Cir.1968): "We believe the effect of the Supreme Court decision...is to prevent enforcement of the wagering statutes..."; McAlister v. Cohen, 308 F.Supp. 517, 519 (S.D.W.Va. 1970): "the statutes...had meanwhile been found to be unconstitutional and unenforceable..."; U. S. v. Sams, 406 F.2d 404, 405 (3d Cir.1969) the Supreme "Court has now held the [wagering] statutes to be unconstitutional..."; Rewis v. U.S., 418 F.2d 1218,1222 (5th Cir. 1969): "Supreme Court's invalidating these provisions" held not to require new trial on other charges; U.S. v. Malcouronne, 283 F.Supp. 87,88 (D.Mass. 1968): "recent opinions of the Supreme Court... struck down certain registration and record-keeping requirements under the so-called Federal Wagering Tax Act..."; U.S. v. One 1967 Buick Electra, 289 F.Supp. 642, 644

Subsequent to Grosso there has developed litigation concerning whether or not a civil forfeiture proceeding seeking the forfeiture of paraphernalia used in wagering activities can be lawfully maintained in the light of Grosso and Marchetti. The leading case in this regard is U. S. v. U. S. Coin & Currency 393 F.2d 499 (7th Cir. 1968).* There, on remand, the Seventh Circuit held that the only purpose of the forfeiture proceedings were to punish those in the wagering profession and since, as the Court noted, violations of the wagering statute "are no longer punishable directly," "It follows that they should not be punished indirectly through forfeiture." (at 500). Similar results have been reached in other cases. Thus, in U. S. v. One 1967 Buick Electra, 289 F.Supp. 642 (D.N.J.1968) the Court followed the rationale of U. S. Coin & Currency, concluding that the forfeiture action could not be maintained because it allowed the Government to do indirectly what it could not do directly, i.e., punish the person engaged in the wagering business. See also U.S. v. $3,296.00 In Currency, 286 F.Supp. 543(N.D.N.Y. 1968),

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(D.N.J.,1968): "The Court found that the registration and tax stamp provisions were constitutionally impermissible..."; U. S. v. $3,296.00 in Currency, 286 F.Supp. 543 546 (N.D.N.Y.1968): Supreme Court held statutes "were unconstitutional..."

* See note at p.13 detailing history of this litigation.

U.S. v $125,882 In U.S. Currency, 286 F. Supp. 643 (S.D.N.Y. 1968), U. S. v. One Philco Television, 292 F.Supp. 35 (S.D. Tex. 1968).*

The rationale behind these cases is that the Government cannot be allowed to indirectly penalize the person engaged in wagering by forcing a forfeiture of his property used in that enterprise. Nor has the Government been successful in otherwise attempting to circumvent the mandates of Marchetti and Grosso, such as by enjoining the gambler from accepting wagers without complying with the taxing statutes, U. S. v. Riccio, 282 F.Supp.979 (N.D.Ill. 1968). The same rationale must be applied to a forced collection of the wagering tax, itself. Since the Government is not entitled to prosecute to enforce the tax, or to enjoin to enforce the tax, or to penalize the gambler by forfeiture proceedings to enforce the tax, there is no reason why the Government should be enabled to force compliance through forceable seizure of petitioner's property to satisfy an alleged tax liability.

Though the question raised herein has been heretofore raised but not decided**

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* Contra: U. S. V. One 1965 Buick, 392 F. 2d 672 (6th Cir.1968) reh.den. 397 F.2d 782; U.S. v. $3,701.05, 302 F.Supp. 451 (E.D.Mo. 1969); U. S. v. $3,036, 300 F.Supp. 1386 (E.D.Mo. 1969); U.S. v. Scott, 425 F.2d 817 (6th Cir. 1970); Cf: U.S. v. Filing, 410 F.2d 459 (6th Cir. 1969); Silbert v. U.S., 282 F.Supp. 635 and 289 F.Supp. 318 (D.Md. 1968).

** U.S. v. Solon, 294 F.Supp. 880 (E.D.N.Y. 1968) aff'd 405 F.2d 1211 (2d Cir. 1968).

and though several courts in dicta have suggested that Marchetti and Grosso have left the wagering excise tax viable* only Washington v. U.S., 402 F.2d 3 (4th Cir. 1968) seems to have directly dealt with the issue and found a lien for delinquent wagering taxes to be enforceable. However that case overlooks the critical fact, recognized by this Court in Marchetti, 390 U.S., at 47-48 that "payment of the wagering taxes has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained." There is no reason why this same basis for applying this Fifth Amendment standard to voluntary payment of the tax should not be applied to involuntary forced payment thereof. So long as the tax is held viable courts, such as the Washington Court, will feel free, to issue warrants to seize not only gambling records which will be used to assess the wagering tax, but ultimately to produce evidence for use in state prosecutions.*

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* See Washington v. U.S. 402 F.2d, at 6:

> However, appellants now contend that the search warrant is invalid under the Marchetti and Grosso decisions. We find no support in those cases for appellants' contention. The Supreme Court did not invalidate the wagering tax statutes; it did not abolish the criminal offenses therein specified; it did not say that an indictment or an information would not lie. The carefully circumscribed holding is that a defendant may not be convicted of a criminal violation of the wagering tax laws if he has properly claimed his constitutional privilege against self-incrimination.

Not only does the conclusion reached in Washington allow the Government to force the collection of taxes it could not otherwise, but it leaves the door open for the Fifth Amendment privilege sought to be protected in Marchetti and Grosso to be totally circumvented.

II

One of the critical arguments made in the Courts below was that the assessment for the four year period from July, 1961 to May, 1965 based upon the total amount of wagers allegedly collected on the last three days of that period, was made necessary by the failure of petitioner to keep - or perhaps more accurately, to disclose - his records of actual wagers collected by him for this period. Thus the Government noted in its Brief to the Court of Appeals (at 17-18):

> In the excise tax area as elsewhere, the Internal Revenue Code provides a self-assessing scheme of taxation. Taxpayers are required to keep

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> Under the circumstances, we conclude that where, as here, there exists probable cause for belief that an offense has been committed (which appellants conceded) a valid search warrant may issue even though the Government may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination. We hold that the judgment for wagering excise tax deficiencies rests upon a valid assessment and will be affirmed. (Emphasis added)

> records of their affairs and to file returns. For excise taxes, the statute requires the maintenance of daily records indicating the gross amount of the wagers handled (26 U.S.C. § 4403). The implementing regulation (26 C.F.R. § 44.4403-1) requires daily records showing the gross amount of wagers by class and type. These requirements would be met by retaining the betting slips normally generated in gambling enterprises.
>
> Where these record-keeping duties are discharged by a taxpayer, there is obviously no problem involved in determining the excise tax due and there is no need to resort to estimates in assessing tax liability. In the more usual case where the record-keeping requirements are ignored by the taxpayer, the Internal Revenue Service is forced to either estimate the tax liability from whatever sources are are available or to reward the guilty taxpayer by excusing his tax liability because of his failure to keep the records from which that liability could have been determined with precision...

And Judge Mansfield noted also (A-5-6) that

> The Government calculated the tax due on the basis of a projection. Plaintiff had not kept a daily record of the wagers as required by 26 U.S.C. § 4403. The only available figures were taken from wagering records in the form of

> "policy slips" for the period May 19-21, 1965, which had been seized...[*]

Clearly, however, what both the Government and the Courts below overlooked is the fact that petitioner was not required to disclose any such records to the Government. The Government's arbitrary assessment herein (cf. Pizzarello v. U.S., 408 F.2d 579 (2d Cir.1969) cert.den. ___U.S.___) effectively punished petitioner for exercising his Fifth Amendment right in refusing to come forward with any such records, either in an attempt to correct the assessment or in an attempt to sue for a refund after payment in proceedings where the burden would be upon the taxpayer.**

---

* The totally speculative nature of the estimated taxes is illustrated further on in Judge Mansfield's opinion (A-6):

> The average of these three days was computed. That average was multiplied by the number of days in which the Government calculated Hamilton wagered. This number of days was estimated by multiplying four (the number of years Hamilton "admitted" accepting wagers by six (the number of days per week, Sundays and holidays excepted, that the Government assumed that Hamilton accepted wagers per week). (Footnotes omitted; emphasis added.)

** Helvering v. Taylor, 293 U.S.407(1935); Federal National Bank v. Commissioner, 180 F.2d 494 (10th Cir.1950); cf: Audano v. U.S., 428 F.2d 251 (5th Cir. 1970).

In Grosso this Court held not only that the failure of petitioner there to pay the wagering excise tax could not be punished but, in addition, that his failure to file the required return therefor could not be punished:

> We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment, or from submission of Form 730, will ultimately be proffered to state and federal prosecuting officers.
>
> In these circumstances, it would be impossible to say that the hazards of incrimination which stem from the obligation to pay the excise tax and to file Form 730 are "imaginary and unsubstantial."... [P]etitioner's submission of an excise tax payment, and his replies to the questions on the attendant return, would directly and unavoidably have served to incriminate him; his claim of privilege as to the entire tax payment procedure was therefore neither "extreme" nor "extravagant."...
>
> (390 U.S., at 66-67)

By the same token it must be noted that the gravamen of Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965), Haynes v. U.S., 390 U.S. 85 (1968), Leary v. U.S., 395 U.S. 6 (1969) and U.S. v. Covington, 395 U.S. 57 (1969), as well as Marchetti and Grosso, is that the record revealing requirements of the taxing statutes are as much in violation of the petitioner's Fifth Amendment right not to incriminate himself as are the tax-paying requirements, if not more so.

To require petitioner to produce incriminating documents and records which can and undoubtedly would be used against him in state or federal prosecutions in order to correct an assessment or sue for a refund, or otherwise suffer the forced extraction from him of an arbitrarily calculated excise tax of over $300,000 clearly contravenes the spirit of this Court's prior decisions noted above. It in effect allows the Government to severely punish the defendant for exercising his Fifth Amendment rights.

As noted in U.S. v. Balsiger, 408 F.2d 112, at 115 (3d Cir.1969):

> These decisions [Marchetti and Grosso] protected professional gamblers from the necessity of incriminating themselves by complying with statutory requirements that they register as gamblers, obtain and post a gambling stamp and supply the United States with detailed information about illicit business. It was neither said nor in our view implied that professional gamblers should be protected against the discovery of their otherwise unlawful acts by procedures which would not compel them to aid in their own incrimination. (Emphasis added.)

And see U. S. v. Malcuzynski, 283 F.Supp. 87, 88 (D.Mass. 1968) characterizing Marchetti and Grosso as striking down "registration and record-keeping requirements under the so-called Federal Wagering Tax Act..."

The question of whether or not arbitrary calculation of a wagering tax assessment can be maintained on the ground that the taxpayer has failed to keep or produce records he was not required to disclose to the Government, and whether such an arbitrary assessment constitutes

an unlawful punishment of the taxpayer for asserting his Fifth Amendment rights, seems never to have been decided. It is squarely raised herein and requires the critical consideration of this Court.*

CONCLUSION

FOR THE ABOVE STATED REASONS, PETITIONER RESPECTFULLY SUBMITS THAT THE ISSUES HEREIN ARE SUBSTANTIAL AND OF CONSIDERABLE IMPORTANCE IN THE PROPER APPLICATION OF THE MARCHETTI AND GROSSO DECISIONS, AND OUGHT TO BE REVIEWED BY THIS COURT. THE PETITION SOUGHT HEREIN SHOULD BE GRANTED.

Respectfully submitted,

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* The question raised herein concerning waiver of Fifth Amendment rights in order to bring an action for refund goes also to demonstrating that, in fact, no adequate remedy at law exists. See footnote at p. 12.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

DENNIS HAMILTON,

Petitioner,

-against-

UNITED STATES OF AMERICA, EDWARD J. FITZGERALD, JR., District Director of Internal Revenue for the District of Manhattan, and RANDOLPH W. THROWER, Commissioner of Internal Revenue of the United States of America,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court-house in the City of New York, on the twenty-eighth day of August one thousand nine hundred and seventy,

Present: HON. J. EDWARD LUMBARD,
Chief Judge

HON. STERRY R. WATERMAN,
Circuit Judge

HON. WILLIAM J. JAMESON,
District Judge

U. S. District Court
Filed
Sep 21 1970
S.D. of N.Y.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

Dennis Hamilton,

Plaintiff-Appellant,

v.

United States of America, Edward J. Fitzgerald, Jr., District Director of Internal Revenue for the District of Manhattan, Randolph W. Thrower, Commissioner of Internal Revenue of the United States of America,

Defendants-Appellees.

DOCKETED A JUDGMENT #70,964 ON Sept. 22, 1970 AT M.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By
Vincent A. Carlin
Chief Deputy Clerk

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 28, 1970 (HAMILTON V. UNITED STATES OF AMERICA, et al) NO. 34574

Before LUMBARD, Chief Judge, WATERMAN, Circuit Judge, and JAMESON, District Judge.

PER CURIAM:

Hamilton was convicted of gambling charges after arrests on July 22, 1957; September 16, 1959; November 10, 1959; November 6, 1961; and finally on May 21, 1965. He sought to enjoin the collection of a deficiency assessment based on an estimate of his income from July 1, 1961 through May 21, 1965, on the basis of three days receipts during May 1965, evidence of which had been seized during the execution of search warrants for three separate places of business operated by Hamilton in Manhattan and the Bronx. We affirm for the reasons stated in Judge Mansfield's opinion, 309 F.Supp. 468 (S.D.N.Y.1969) which, among other things, pointed out that the facts differ in important respects from those which we consider dispositive in Pizzarello v. United States, 408 F.2d 579 (1969), cert. den. 396 U.S.986, 90 S.Ct. 481, 24 L.Ed. 2d 450 (1970).

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (MANSFIELD, U.S.D.J.) ENTERED NOVEMBER 14, 1970 DENYING MOTION FOR PRELIMINARY INJUNCTION (HAMILTON V. UNITED STATES OF AMERICA, et al., 69 Civ. 2727)

MANSFIELD, District Judge.

In this action to enjoin the Government from levying, collecting or assessing excise taxes in the sum of $385,491.71 upon wagers pursuant to 26 U.S.C. § 4401,[1] and for a judgment declaring the assessments to be invalid, plaintiff seeks preliminary injunctive relief pursuant to Rule 65, F.R.C.P., restraining any attempt to collect the tax so assessed. For the reasons hereinafter stated, the motion is denied.

Plaintiff was arrested on May 21, 1965, and charged criminally pursuant to 26 U.S.C. § 7262[2] with failure to pay the excise tax on wagers received in violation of the federal wagering tax laws (26 U.S.C. § 4401) and failure to pay a special $50 occupational tax imposed on wagering in violation of 26 U.S.C. § 4411.[3] On April 5, 1968 the Government voluntarily dismissed the criminal complaint against Hamilton on the authority of the Supreme Court's decisions in Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 906 (1967).

On January 2, 1969, pursuant to 26 U.S.C. §4401, the Government filed an assessment against plaintiff in the sum of $385,491.71 for unpaid excise taxes due on wagers allegedly handled during the period July 1, 1961 to May 21, 1965. The

Government calculated the tax due on the basis of a projection. Plaintiff had not kept a daily record of the wagers as required by 26 U.S.C. § 4403.[4] The only available figures were taken from wagering records in the form of "policy slips" for the period May 19-21, 1965, which had been seized pursuant to search warrants issued by the United States Commissioner on May 21, 1965. The average of these three days was computed.[5] That average was multiplied by the number of days in which the Government calculated Hamilton wagered. This number of days was estimated by multiplying four (the number of years Hamilton "admitted" accepting wagers[5a] by six (the number of days per week, Sundays and holidays excepted, that the Government assumed that Hamilton accepted wagers per week). This process resulted in a projected gross take of $2,883,955 from plaintiff's wagering activity, upon which there was assessed an excise tax of 10% pursuant to § 4401, resulting in $288,395.54, plus $97,095.71 interest, or a total assessment of $385,492.25. Pursuant to 26 U.S.C. §6301,[6] the Internal Revenue Service served a notice of a federal lien in the sum of $382,122.13[7] on plaintiff, and accompanied this with notice of levy[8] in the amount of $385,491.71, and seizure of the contents of a safety deposit box held by Hamilton.

[1, 2] Plaintiff's argument that the procedure used to enforce the wagering tax, 21 U.S.C. §4401, is unconstitutional must be rejected on both substantive and procedureal grounds. In Marchetti v. United States, 390 U.S. 39, 61, 88 S.Ct. 697, 19 L.Ed.2d 889 (1967), the Supreme Court upheld the constitutionality of the tax on wagers, 26 U.S.C.

§ 4401. The Supreme Court has also upheld the summary proceedings used in this case to determine the assessment. So long as an adequate opportunity to contest the assessment exists, assessment by summary administrative proceedings, without notice or hearing, does not violate the due process clause. Phillips v. Commissioner, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931); Pizzarello v. United States, 285 F.Supp. 147, 152, reversed on other grounds, 408 F.2d 579 (2d Cir. 1968). In any event the request for declaratory relief must be denied on the authority of 28 U.S.C. § 2201, for lack of jurisdiction. Accord: cf. Koin v. Coyle, 402 F.2d 468, 470 (7th Cir. 1968).

[3] Turning to plaintiff's application for injunctive relief, we are faced with the strong policy against such relief expressed by Congress in 26 U.S.C. § 7421, which prohibits injunctive relief except in certain situations not applicable here, and in the Supreme Court's decision in a leading case on the subject, Enochs v. Williams Packing Co., 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed. 2d 292 (1962), holding that such relief is generally denied pursuant to § 7421 but may be granted in the rare case where a plaintiff is able to show (1) that "under no circumstances could the Government ultimately prevail," and (2) that "equity jurisdiction otherwise exists." As Chief Justice Warren noted, the purpose of these two requirements is to insure against interference with the Government's collection of taxes:

> "The manifest purpose of § 7421(a) is to permit the United

States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the Nut Margarine, [Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 442] case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in 'the guise of a tax.' Id., 284 U.S. at 509, 52 S.Ct. at 263.

"We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interefere with a collateral objective of the Act - protection of the

collector from litigation pending a suit for refund." (370 U.S. at 7-8, 82 S.Ct. at 1129)

Relying upon the recent decision of the Second Circuit Court of Appeals in Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), which was also a wagering tax case, plaintiff urges that the Government cannot "ultimately prevail" here because its "manner of calculation is grossly excessive and illegal on its face as a matter of law" and would have the effect of violating his Fifth Amendment right against self-incrimination by coercing him into waiving that right and disclosing his gambling activities in order to avoid imposition of a tax in excess of what he is obligated to pay. In addition, although plaintiff does not urge it as a ground in his moving papers or brief, his complaint (¶ 2) alleges on information and belief that the three days' "policy slips" used as the basis for the computation under attack were unlawfully seized in contravention of the Fourth Amendment.

The method used by the Government here to compute the assessment is substantially the same as that criticized by the Court of Appeals in Pizzarello, where the Government used a three-day average of policy wagers as the basis for calculating a gambler's gross wagering business over a five-year period. In the present case a three-day average was used to calculate gambling revenue for four years. Although we agree that the relatively small sample would not appear to the uninitiated to be necessarily representative of plaintiff's

business over such a long period, we cannot conclude as a matter of law that such a projection is irrational, arbitrary, and incapable of being supported. For instance, experts in the business of gambling, given the period of time during which plaintiff admittedly was engaged in accepting policy wagers, the area in which he operated, and gambling data independently collected by objective bodies, might testify to the reasonableness of the projection. Similar computations have been accepted by various courts. See United States v. Washington, 251 F.Supp. 359 (E.D.Va. 1966) affd., 402 F.2d 3 (4th Cir. 1968); Pinder v. United States, 330 F.2d 119 (5th Cir. 1964); Ginsberg v. United States, 67-2 USTC ¶ 15,757 (C.D.Cal. 1966), affd. per curium, 408 F.2d 1016 (9th Cir. 1969); Mersel v. United States, 67-2 USTC ¶ 15,756 (S.D.Fla. 1967); Hodoh v. United States, 153 F.Supp. 822 (E.D.Ohio 1957) O'Neill v. United States, 198 F.Supp. 367 (E.D.N.Y.1961); Shades Ridge Holding Co. T.C. Memo 1964-275, affd. per curiam sub nom. Fiorella v. Commissioner of Internal Revenue, 361 F.2d 326 (5th Cir. 1966); Isaac T. Mitchell, T.C. Memo 1968-137 (1968) (appeal pending). Resort to such methods of computation here became necessary only because plaintiff failed to maintain and furnish the daily records required to be kept by 26 U.S.C. § 4403 (see n. 4). Under such circumstances the propriety of calculating taxes from incomplete records has been recognized. See, e. g., Mendelsohn v. Commissioner of Internal Revenue, 305 F.2d 519 (7th cir.), cert. denied, 371 U.S. 877, 83 S.Ct. 149, 9 L.Ed.2d 114 (1962); Harbin v. Commissioner of Internal Revenue, 40 T.C. 373 (1963).

Regardless of such computations we must recognize that the available evidence, including the three days' receipts and plaintiff's admission that he was in the business of accepting wagers on policy slips over the four-year period from July 1961 to May 21, 1965, indicates that a substantial amount of tax is due and owing. Plaintiff cannot, therefore, seriously contend that he does not owe taxes to the Government, or that the Government would not ultimately prevail to the extent of at least a substantial portion of the assessment. In this respect the present case is significantly distinguishable from Pizzarello where Judge Moore, although criticizing the method of computation, found that the Government was precluded from collecting any of the taxes assessed in that case because (1) there was a failure of proof that Pizzarello had accepted wagers over the five-year period alleged, and (2) the assessment depended upon illegally seized evidence, without which it could not possibly be supported.

Neither of the foregoing grounds for Pizzarello exist here. The record before us, unlike that in Pizzarello, reveals an independent evidentiary basis for the Government's determination that plaintiff was in the wagering business from July 1961 to May 1965. Furthermore, the policy slips used as the basis for the assessment were seized pursuant to three search warrants issued on May 21, 1965 by United States Commissioner Bishopp. Plaintiff has failed to offer a scintilla of evidence indicating that the warrants were invalid or that there

was an absence of grounds sufficient to constitute probable cause for their issuance. Although we may infer that the warrants were issued in connection with an investigation into violations of the federal wagering tax laws, it is also possible that the Government was investigating violations of other statutes, including that prohibiting interstate gambling, 18 U.S.C. § 1952. Even if the investigation was limited to possible violations of the federal wagering tax laws, such an investigation was permitted in 1965 pursuant to the Supreme Court's decisions in United States v. Kahriger, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 (1952); and Lewis v. United States, 348 U.S.419, 75 S.Ct. 415, 99 L.Ed. 475 (1955), upholding convictions for violation of the federal wagering tax statutes. Since it was not until 1968 that the Supreme Court overruled these decisions in Marchetti and Grosso, supra, law enforcement officers were entitled to rely upon the earlier decisions and to obtain warrants for searches pursuant to them. See Silbert v. United States, 282 F. Supp. 635, 646 (D.Md.1968). The situation here is clearly distinguishable from that before the Second Circuit in Pizzarello, where the search had been declared unconstitutional before the tax assessment and motion for injunctive relief.

[4] In any event, even if doubt existed as to the validity of the searches conducted pursuant to 1965 warrant, we would not be required on that account to grant relief, since "collateral determination of the admissibility of evidence in an administrative tax proceeding or investigation is not a proper sphere for injunctive intervention in the exercise of

equitable jurisdiction." Koin v. Coyle, 402 F.2d 468, 470 (7th Cir. 1968), quoting from Zamaroni v. Philpott, 346 F.2d 365, 366 (7th Cir. 1965); cf. Campbell v. Guetersloh, 287 F.2d 878, 881 (5th Cir. 1961).

[5, 6] He cannot question the constitutionality of the tax. Marchetti v. United States, supra, 390 U.S. at 61, 88 S.Ct. 697, 19 L.Ed.2d 889, and he has failed completely to furnish any evidence supporting his contention that the amount of the tax is greater than that actually due. Despite the existence of evidence that some tax is due, his position appears to be that he should be permitted to avoid payment of any tax on the basis of his conclusory statement to the effect that the assessment is "astronomical." Furthermore, he fails to offer any facts supporting his claim of economic hardship, such as evidence with respect to his financial condition, net worth and earnings.

The possibility of an impermissible choice would be eliminated altogether if plaintiff were permitted to testify in opposition to the assessment without his testimony being used against him in criminal proceedings. See, e. g., Simmons v. United States, 390 U.S.377, 389 88 S.Ct.967, 19 L.Ed.2d 1247 (1967) (defendant's testimony in support of motion to suppress may not be used against him at trial on the issue of guilt if he objects). However, plaintiff here has a remedy available to him that was not present in the various forfeiture decisions relied upon by him, where the plaintiff was faced with a forfeiture that would become final unless he

incriminated himself. See, for instance, United States v. United States Coin and Currency, 393 F.2d 499 (7th Cir. 1968); United States v. $125,882 in U.S. Currency, 286 F.Supp. 643 (S.D.N.Y.1968); Boyd v. United States, 116 U.S.616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); Garrity v. State of New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (public servant faced with loss of position unless he testified); Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (attorney forced to testify or lose his license).

Here, as distinguished from those cases, since the excise tax is divisible, plaintiff may, if he considers the assessment to be excessive, pay part of the tax and sue for a refund, see Flora v. United States, 362 U.S. 145, 171, n. 37(b), 80 S. Ct. 630, 4 L.Ed.2d 623(1959). Although the burden would be upon him in such a suit to show that the assessment is wholly or partially incorrect, Helvering v. Taylor, 293 U.S. 507, 55 S.Ct. 287, 79 L.Ed. 623 (1935); Commissioner of Internal Revenue v. Hansen, 360 U.S. 446, 79 S.Ct. 1270, 3 L.Ed.2d 1360 (1959), that burden would be met if he showed that the method of assessment was so arbitrary as to render the assessment fatally defective. United States v. Hover, 268 F.2d 657, 665 (9th Cir. 1959); Rinieri v. Scanlon, 254 F.Supp. 469 (S.D.N.Y.1956); see Mertens, 9 Law of Federal Income Tax § 60.61, n.3.1. However, since the record here indicates that some tax is undoubtedly due and owing, the issue on a refund suit would be one of amount rather than total invalidity. Furthermore, after commencement of such a refund

suit, he may wait until criminal prosecution for violation of gambling laws becomes barred by the statute of limitations before offering otherwise incriminating proof, including his own testimony, with respect to the incorrectness of the assessment and thus avoid its incriminating effect. In the present case, for instance, prosecution of the plaintiff for violation of New York State or federal laws on account of gambling activities forming the basis of the assessment will be barred by the five-year statute of limitaions after May 21, 1970[9] less than seven months from now. Accordingly, we conclude that the plaintiff has failed to make a sufficient showing that he is faced with an impermissible choice in violation of his Fifth Amendment rights and his motion must be denied.

The foregoing constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P.

It is so ordered.

- FOOTNOTES -
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ETC.

1. That section provides:

"§ 4401. Imposition of tax

"(a) Wagers. - There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

"(b) Amount of wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(c) Persons liable for tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this

subchapter on all such wagers received by him."

2. That section provides:

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined no less than $1,000 and not more than $5,000."

3. That section provides:

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

4. That section provides:

"Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable * * *."

5. The slips upon which the average was computed were of two types. The slips representing the "three digit number" form of wager totalled $5,715.99, or $1,905.33 per day. The "single" action slips amounted to $1,077.40 for May 19, and 20. The slips were "fragmentary" for May 21 (Aff.

- FOOTNOTES -
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ETC.

of Mr. Gallagher, p. 3). The average was $538.70 for each of the two days. The total average of $2,443.03 was computed by adding the different types.

5a. Plaintiff also had been arrested and convicted for dealing in "policy slips" on four occasions, July 22, 1957, September 16, 1959, November 10, 1959 and May 21, 1965.

6. That section provides:
"The Secretary or his delegate shall collect the taxes imposed by the internal revenue laws."

7. The Internal Revenue Service is empowered to do this by 26 U.S.C. § 6321, which provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

8. The Internal Revenue Service has this power pursuant to 26 U.S.C. § 6331, which provides:

- FOOTNOTES -
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ETC.

"(a) Authority of Secretary or delegate. - If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 5334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

- FOOTNOTES -
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ETC.

"(b) Seizure and sale of property - The term 'levy' as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

"(c) Successive seizures. - Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid."

9. The New York Statute of Limitations Code of Cr.Proc. § 142, provides:

> "A prosecution for a felony * * * must be commenced within five years after its commission * * *."

The New York State criminal provision,

- FOOTNOTES -
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, ETC.

Penal Law § 225.10, McKinney's Consol. Laws, c. 40, that is probably applicable provides:

> "A person is guilty of promoting gambling in the first degree when he knowingly advances or profits from unlawful gambling activity by:
>
> * * * * * * *
>
> "(2) Receiving, in connection with a lottery or policy scheme or enterprise, (a) money or written records from a person other than a player whose chances or plays are represented by such money or records, or (b) more than five hundred dollars in any one day of money played in such scheme or enterprise.
>
> Promoting gambling in the first degree is a class E felony."

With respect to federal offenses, 18 U.S.C. § 3282 provides:

> "§ 3282. Offenses not capital
>
> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (MANSFIELD, U.S.D.J.) ENTERED JANUARY 19, 1970, DISMISSING THE COMPLAINT (HAMILTON V. UNITED STATES OF AMERICA, et al., 69 Civ. 2727)

MANSFIELD, D.J.

The Government has filed an assessment against plaintiff in the sum of $385,491.71 for an unpaid tax on alleged wagering activity pursuant to 26 U.S.C. § 4401. Plaintiff moved for a preliminary and permanent injunction against collection of the assessment, in part through execution of a lien on the contents of a safety deposit box controlled by plaintiff. In an opinion filed November 14, 1969, we denied the request for a preliminary injunction on the authority of Enochs v. Williams Packing Co., 370 U.S. 1 (1962), because the assessment was not unreasonable as a matter of law. The request for a permanent injunction was not decided.

The Government now invokes Rule 12(b)(1) of the Federal Rules of Civil Procedure and moves to dismiss plaintiff's request for a permanent injunction (and thus his complaint) for lack of jurisdiction over the subject matter of the action. In opposition, plaintiff contends that the motion should be denied because he is entitled to have the reasonableness of the assessment determined either at a hearing or a trial.

The fact that plaintiff may be entitled to challenge the assessment does not preclude granting the Government's motion. The Supreme Court foreclosed

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further consideration of plaintiff's complaint by this court when plaintiff failed to meet the two tests outlined in Enochs, supra, satisfaction of which would have warranted grant of a preliminary injunction. Plaintiff's opposition to the reasonableness of the assessment can be asserted in a refund suit before the Tax Court.

Accordingly, the motion is granted and the complaint dismissed.

It is so ordered.

/s/ Walter R. Mansfield
U.S.D.J.

Dated: January 19, 1970.